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In the
Supreme Court of the United States

PHEASANT BRIDGE CORPORATION,

Petitioner,

v.

THE TOWNSHIP OF WARREN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER PHEASANT BRIDGE CORPORATION

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Attorneys for Amicus Curiae

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QUESTIONS PRESENTED

Where Petitioner successfully argued that the application of the zoning ordinance to its property did not bear a substantial relationship to its purposes, did the New Jersey Supreme Court err in holding that Petitioner was not entitled, under this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), to just compensation for the period during which the ordinance burdened its property?

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INTRODUCTION

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioner Pheasant Bridge Corporation on October 26, 2001. All parties have consented to the filing of this brief.[1]

INTEREST OF AMICUS CURIAE

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 121 S. Ct. 2589 (2001), a case now pending in the Court.

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. Specifically, PLF argues that the New Jersey Supreme Court's decision conflicts with this

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[1] Letters evidencing the consent of all parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.2(a).

In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and with the decisions of a multitude of state and lower federal courts. In particular, PLF argues that it is constitutionally improper to deny compensation for a temporary taking when a regulation does not substantially advance legitimate state interests.

STATEMENT OF THE CASE

Petitioner is the owner of approximately 28.98 acres of vacant land in the Township of Warren. In December, 1993, the Township placed Petitioners' land within a newly created environmental protection zone (EP-250 zone) and thereby increased the minimum allowable lot size on the property from one and one half acres to six acres. Petitioners' land was so classified despite the fact that the environmental concerns giving rise to the EP-250 zone were not applicable to the property. At the same time, other similarly situated properties were permitted to remain under the previous zoning scheme.

Petitioners filed an action against the Township, asserting that the EP-250 zone was invalid as applied to their property and that it failed to substantially advance legitimate state interests, thereby effecting a taking of private property without just compensation. The trial court dismissed Petitioner's claim of invalidity and rejected the takings claim because Petitioner did not argue that the ordinance deprived it of all use of land. On appeal, the Appellate Division held that the trial court should have addressed the claim of invalidity and the takings claim under the substantial advancement test.

The trial court subsequently found that Petitioner had suffered a taking because the EP-250 zone failed to substantially advance a legitimate state interest as applied to Petitioner's land. The Appellate Division then reversed, concluding that takings law called for compensation only when a regulation denies a property owner substantially all economic use of property. It also reversed the trial court's judgment that the EP-250 zone was invalid as applied to Pheasant Bridge's property.

When the case came before the New Jersey Supreme Court, it agreed with the trial court that the EP-250 zoning was arbitrary and invalid as applied to Pheasant Bridge's property and therefore reversed this aspect of the Appellate Division's judgment. Indeed, the court concluded that application of the zoning scheme to Petitioner's land did not advance its underlying environmental purposes. However, it upheld the Appellate Division's dismissal of Petitioner's takings claim. This decision was based on the court's assertion that compensation is the proper remedy for a temporary regulatory taking only when a challenged regulation is valid and denies all economically beneficial use of property. The court also implicitly adopted the conclusion that a taking does not occur when a regulation does not substantially advance legitimate state interests. This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional law.

SUMMARY OF ARGUMENT

This Court has stressed repeatedly that a regulatory taking occurs when a regulation does not substantially advance a legitimate state interest *or* when it denies an owner all

economically viable use. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). It is also well-established that just compensation is the mandatory remedy for a regulatory taking. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). The decision below contravenes both of these settled principles and thus perpetuates a conflict among lower state courts and between state and federal courts. It also arises as this Court prepares to settle a related conflict pertaining to the scope of *First English* in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 121 S. Ct. 2589. The Court should therefore grant the Petition, or in the alternative, grant and hold this matter pending the issuance of the Court's opinion in *Tahoe-Sierra Preservation Council.*

ARGUMENT

WHETHER A LANDOWNER IS ENTITLED TO COMPENSATION FOR THE EFFECTIVE PERIOD OF A TEMPORARY REGULATION THAT FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST IS AN IMPORTANT QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT

Amicus will limit its discussion to a single critical issue, whether compensation is the constitutional remedy for the effective period of a regulation that fails to substantially

advance a legitimate state interest.[2] It has been over twenty years since this Court decided *Agins v. Tiburon*, and fourteen years since the decision in *First English*, but there is still no consensus among the lower courts on this important question. While some courts conclude, like the New Jersey court, that invalidation is the only relief available under such circumstances, others reason that compensation is required from the moment a regulation violates any substantive takings test. As a result, the jurisdiction matters greatly in any dispute over the applicability of the just compensation remedy. In some, a property owner will be reimbursed for shouldering the burdens of a restriction that is so irrational as to be declared illegal. In others, she will find that she is required to bear them alone.

I. The Decision Below Eviscerates the Doctrine of Temporary Takings

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In so ruling,

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[2] Petitioner Pheasant Bridge Corp. also asks this Court to decide whether "a land use regulation that does not bear any real and substantial relationship to the ostensible purposes of zoning, as applied to a particular property, fails to substantially advance a legitimate state interest as to that property so as to require the payment of just compensation under the Takings Clause of the Fifth Amendment, without regard to the economic impact of the regulation."

Amicus believes it well-established that a taking occurs where a regulation fails to "substantially advance legitimate state interests" without respect to economic impact factors, *see Agins*, 447 U.S. at 260 (a zoning ordinance "effects a taking if the ordinance does not substantially advance legitimate state interests *or* denies an owner economically viable use of land"); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999) (listing the numerous decisions of this Court that recognize the substantial advancement test as an independent standard of takings liability), and therefore chooses not to address this portion of the Petition for Certiorari.

the Court stressed that "invalidation" of an ordinance that constitutes a taking "is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319. Rather, the self-executing character of that clause required compensation to be paid to the property owner aggrieved by a regulatory taking, regardless of whether the taking turned out to be of limited duration. The only exception was in the case of "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." *Id.* at 321.

Unfortunately, in some jurisdictions, courts have avoided the thrust of *First English*. In particular, when faced with a claim based on a deprivation of all use, a few courts expand the "normal delay" exception to deny the temporary takings remedy. *See Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1258 (N.H. 1992) (stating "[t]he delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership. Any decrease in the value of the subject property that occurs during the pendency of governmental decision making must be borne by the property owner"); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 1203 (Cal. 1998) (concluding that "a judicial determination of the validity of certain preconditions to development is a normal part of the development process," and thus could not give rise to a right to a claim for compensation even when the "precondition" was invalid and denied all use during the judicial proceedings).

On the other hand, when the underlying claim is based on the substantial advancement standard, courts sometimes rule that the compensatory remedy is limited to cases involving a valid regulation that denies all use of property. *Miller & Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483, 486 (Pa. 1998) (holding that an invalid regulation did not give rise to a temporary taking because it did not deny all use of property); *Chioffi v. City of Winooski*, 676 A.2d 786, 790 (Vt. 1996)

(improper denial of variance did not cause a taking because compensation remedy reserved for denials of all use); *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (stating that while a land owner "who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking").

The decision of the New Jersey Supreme Court adopts each of these rationales. In sum, the court below holds that *First English* does not apply if (1) there is any use of property left; (2) if the regulation is found to be invalid; or (3) if the claim for compensation relates to a period during which the regulation was being subjected to judicial challenge. It therefore leaves open the possibility of compensation for a temporary taking only where the government chooses to keep a regulation in place that (1) denies all use of property and (2) has been declared to constitute a taking in a judicial proceeding. This framework effectively reinstates the *Agins* rule, overturned in *First English*, that invalidation is a sufficient remedy for a temporary taking.[3] In practical terms, it requires individual

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[3] The decision below recalls *Agins* in its underlying reasoning as well as in its holding. For example, in *Agins*, the California Supreme Court observed:

> [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measure in favor of measures which are less stringent, more traditional, and fiscally safe."

Agins v. City of Tiburon, 598 P.2d 25, 30 (1979).

Similarly, in the decision below, the New Jersey Supreme Court stated:

(continued...)

landowners to internalize the immense costs (including loss of property value, litigation expenses, and lost profits) associated with all arbitrary and irrational attempts to advance public goals in the land use arena. This state of affairs cannot be squared with this Court's pronouncements or with the decisions of other jurisdictions.

II. The Decision Below Conflicts with the Decision of This Court in *First English* and with the Decisions of State and Federal Courts

A. The Decision Below Conflicts with *First English*

Because the plaintiffs in *First English* claimed a denial of all use of property, the compensatory principles set out in that case were framed in the context of that claim. But the compensatory remedy was not meant to be, and is not logically limited to, any particular takings test. As Justice Stevens acknowledged, the Court's decision in *First English* simply meant that "all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time." *First English*, 482 U.S. at 322 (Stevens, J., dissenting). This principle was anticipated by Justice Brennan's

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[3] (...continued)
If such a distinction were accepted, it could have a chilling effect on land use planning for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge.

Appendix to Petition for Writ of Certiorari (Pet. App.) at 17.

dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, which stated that the government must "pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date that the government entity chooses to rescind or otherwise amend the regulation." 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). Therefore, since it is well-established that a taking results from a regulation that fails to advance a legitimate state interest, temporary takings should logically arise under the substantial advancement standard to the same degree that they flow from a denial of all use of property.[4] Further, the "normal delay" exception is similarly narrow in both contexts. Although Justice Stevens' dissenting opinion in *First English* suggested that it should encompass delay occasioned by resort to the judicial process, *see First English*, 482 U.S. at 334 (Stevens, J., dissenting), this proposition was soundly rejected by the majority. *See id.* at 319 (judicial invalidation of an excessive ordinance after a period of litigation "is not a sufficient remedy to meet the demands of the Just Compensation Clause"); *see*

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[4] This proposition is consistent with the Court's decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687. There, a jury found that the City of Monterey was liable for compensatory damages for a seven year period during which it repeatedly denied a landowner's application to build a residential development. 526 U.S. at 701. The jury reached its verdict after being instructed that it could find a taking if the city's action failed to substantially advance a legitimate state interest or denied all use of property. *Id.* at 701-02.

On appeal, the Court treated *Del Monte Dunes*' claim as a "a claim for a temporary regulatory taking." *Id.* at 704. It then stated that the jury's reliance on the substantial advancement standard was "consistent with our previous general discussions of regulatory takings liability" and affirmed that the City of Monterey could be held liable under that test for the period during which it refused to approve the residential development. *Id.* at 704-07. Though in dissent as to part of the Court's opinion, Justices Souter, O'Conner, Ginsburg and Breyer did not dispute the characterization of *Del Monte Dunes* claim as "temporary" or the application of the substantial advancement test to such a claim. *Id.* at 753 n.12 (Souter, J., dissenting).

also Eberle v. Dane County Board of Adjustment, 595 N.W.2d 730, 742 n.25 (Wis. 1999) (*First English* "clearly considered and rejected" the argument that "when an agency's erroneous action is reversed by a court, there is no taking, because such delay is just a part of the process of developing property").

The decision of the New Jersey Supreme Court cannot be reconciled with the principles articulated by this Court in *First English*. While the *First English* Court declared that "[i]nvalidation of the ordinance . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause," *First English*, 482 U.S. at 319, the court below denied that a compensable taking occurs "as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge." Pet. App. at 14. While *First English* carefully limited the "normal delay" exception to certain administrative processes, the court below ruled that there is "no distinction justifying the need to provide for interim monetary damages" between the sort of delays contemplated by *First English* and for "delay occasioned by resort to judicial processes to challenge application of a zoning ordinance to one's property." Pet. App. at 16. Finally, while *First English* addressed the takings remedy generally, 482 U.S. at 310-12, the court below construed the compensatory remedy to apply only to those takings claims based on one standard; the "denial of all economically beneficial use" test. In light of these conflicts, it is incumbent upon this Court to grant the petition to clarify the scope of the compensatory remedy.

B. The Decision Below Conflicts with Important State Decisions

Given the conflict with *First English*, it is not surprising that the decision below also conflicts with the decisions of several state courts. The Nebraska Supreme Court has, for instance, clearly rejected the narrow temporary takings doctrine adopted below. *See Whitehead Oil Company v. City of Lincoln*,

515 N.W.2d 401 (Neb. 1994). In *Whitehead Oil*, the landowner successfully challenged the validity of a zoning ordinance that limited its property to office uses. 515 N.W.2d 390, 400 (Neb. 1994). The trial court then awarded damages for the five year period of litigation during which the ordinance remained in effect. *Whitehead Oil*, 515 N.W.2d at 404-05. On appeal, the city argued that there could be no compensable temporary taking under these circumstances, and thus that the damages were in error. *Id.* at 407. The Nebraska Supreme Court rejected this contention, concluding that the temporary takings doctrine established in *First English* was applicable to regulatory action that denied less than all use and, in particular, to cases where the regulation failed to substantially advance a legitimate state interest:

> Our determination . . . that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution.

Id. at 408. It therefore upheld a damage award for the period during which the invalid zoning was in effect, calculated as the difference between the fair market value of the property as it existed under zoning allowing development of a convenience store and its value under the subsequent irrational zoning scheme. *Id.* at 411-12.

Michigan courts have similarly relied on this Court's jurisprudence in determining that compensation is required under the state constitution "for the period during which [a substantial advancement] taking was effective." *Poirier v. Grand Blanc Township*, 423 N.W.2d 351, 354 (Mich. 1988); *accord Schwartz v. City of Flint*, 395 N.W.2d 678, 687-88

(Mich. 1986). This rule operates without respect to whether the underlying regulation denies all use of property. Thus, in *Poirer*, the court granted compensation to a landowner whose land was (irrationally) zoned to permit residential uses but not a mobile home park. *Poirier*, 423 N.W.2d at 352, 355. In Arizona, the state's high court found Justice Brennan's dissenting opinion in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 at 637-61 (Brennan, J., dissenting), instructive in holding that a landowner was entitled to compensation under the state constitution for the effective period of an ordinance that was invalidated because it placed some, but not all, of the claimant's property in a conservation zone. *Corrigan v. City of Scottsdale*, 720 P.2d 513, 515-18 (Ariz. 1986). Finally, a Texas appellate court recently held that compensation was due for a one year period during which a temporary building moratorium failed to advance legitimate state interests. *City of Glenn Heights v. Sheffield Development Company, Inc.*, 2001 Tex. App. LEXIS 7212, *52-53 (Ct. App. 2001).

The decision of the New Jersey Supreme Court is patently incompatible with the reasoning of these state courts. Unlike the decision below, these cases acknowledge that the violation of the substantial advancement takings test triggers the right to compensation at the time the violation occurs. *See, e.g., Whitehead Oil*, 515 N.W.2d at 411. They thus recognize that the compensatory remedy is a general remedy not dependent on a denial of all use of property or the "validity" of an ordinance at the time of enactment.[5] *Poirier*, 423 N.W.2d at 353 ("The

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[5] It is worth noting that, outside the "substantial advancement" context, several state courts have relied on the Court's jurisprudence for the general proposition that compensation is the remedy for the effective period of a zoning ordinance that is invalidated on takings grounds. *See Eberle v. Dane County Board of Adjustment*, 595 N.W.2d at 743 (requiring compensation for period during which an invalid zoning ordinance restricted access to

(continued...)

[First English] Court did not distinguish between takings accomplished by the use of police power or by eminent domain. The key consideration was whether there had been a taking."). In contrast, the court below ruled that compensation is required only when there is a prospective and complete denial of all use. In essence, the decision below establishes compensation as a constitutional rarity, one that is to be applied solely in the few cases where government is foolish enough to impose draconian restrictions in the face of judicial declarations that a taking is in the offing. This is not, and should not, be the norm in state courts.

C. The Decision Below Highlights a Conflict Among Federal Courts

The decision below highlights an ongoing conflict among the federal courts as to the remedy for a regulation that fails to substantially advance legitimate state interests. On the one hand, some federal courts hold that there is no right to just compensation for the effective period of a land use restriction that fails to substantially advance legitimate state interests unless it also severely impacts the value of property. *See Loveladies Harbor, Inc. v. United States,* 15 Cl. Ct. 381, 389-90 (Cl. Ct. 1988) (stating that, under the substantial advancement test, the "balancing of plaintiffs' private interests and the government's public interests reveals a private interest much more deserving of compensation," but ultimately holding that "this court cannot find a taking simply because there was no substantial advancement of a legitimate state interest"); *see also John E. Long, Inc. v. The Borough of Ringwood*, 61 F. Supp. 2d 273, 287 (D. N. J. 1998), *aff'd*, 213 F.3d 628 (3d Cir. 2000) (declaring that a "temporary taking that denies the landowner all

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[5] (...continued)
private property); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 511 (1983) (compensation due for "period between the date the regulation took effect and the date it was rescinded").

use of his or her property . . . requires compensation for the time period of the taking").

On the other hand are federal courts that properly grant the compensatory remedy when a regulation is invalidated under the substantial advancement test. The Eleventh Circuit, for example, has explicitly endorsed the idea that there is a right to compensation during the effective period of an invalidated regulation. *See Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987); *see also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 613 (11th Cir. 1997) (stating that if a regulation "goes so far in diminishing the landowner's interests as to constitute a taking, just compensation may be awarded running from the regulation's effective date"). In *Wheeler*, the City passed an ordinance that "outlawed construction of apartment complexes" throughout the city limits, including on plaintiff's land. *Wheeler*, 833 F.2d at 268. The district court found, and a panel of the Fifth Circuit subsequently agreed, that the city's actions "bore no substantial relationship to any legitimate police power interest," and therefore caused a taking. *Id.* The case was subsequently remanded to the district court for a determination of damages, but eventually returned to the newly-created Eleventh Circuit after the district court failed to properly award compensation for the period during which the invalidated ordinance was in effect. *Id.* at 269. At that point, the court of appeals reiterated that "the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." *Id.* at 270. The court pointed to *First English* as vindicating its earlier conclusion that compensation was required for the effective period of an irrational ordinance. *Id.*

The Ninth Circuit has similarly determined that compensation is the remedy for an invalidated permanent confiscatory regulation. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). In *Tahoe-Sierra*, the court of appeals considered

whether a temporary moratorium caused a taking. After reviewing *First English*, the court stated: "[A] *permanent* regulation leads to a *temporary* taking [requiring compensation] when a court invalidates the ordinance after the taking." *Id.* at 778 (italics in original; underline added). Thus, although the court (incorrectly) held that an intentionally temporary restriction could not rise to the level of a taking, its reasoning clearly implies that compensation is due for the period between enactment of a *permanent* regulation that violates the Court's takings standards and the judicial discovery of such a violation.

This Court has, of course, granted certiorari in *Tahoe-Sierra* to determine "[w]hether the Court of Appeals [for the Ninth Circuit] properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution." 121 S. Ct. 2589. Though it is fairly narrow, this question will require this Court to grapple with the scope of the temporary takings doctrine and may compel it to decide whether compensation is due from the moment a temporary or permanent regulation contravenes the Court's basic takings rules. As a result, *Tahoe-Sierra* implicates the fundamental issue underlying the decision below: Does implementation of a regulation that is infirm under a traditional takings test trigger the compensatory remedy?

As they now stand, the decisions of the Ninth and Eleventh Circuits cannot be reconciled with the decision below. The federal decisions hold that compensation must be paid for the effective period of a "permanent" regulation that is invalidated on takings grounds, while the court below holds that monetary relief is unavailable in these circumstances. Pet. App. at 14, 20. Neither of these positions represents a fully correct application of the temporary takings doctrine, which is best understood as applying the compensatory remedy to all regulations, whether temporary or permanent, that fail the Court's substantive takings tests. *See, e.g., City of Glenn*

Heights, 2001 Tex. App. LEXIS 7212 at *52-53 (compensation required for effective period of temporary moratorium that did not substantially advance legitimate state interests). Nevertheless, they aptly illustrate the confusion prevalent in the lower courts over the scope of the temporary takings remedy as articulated in *First English*.

In agreeing to review the Ninth Circuit's decision in *Tahoe-Sierra*, the Court has positioned itself to resolve this confusion. Thus, while the manifest conflict between the decision below and the decisions of other state and federal courts, not to mention *First English*, warrants an outright grant of review under Rules 10(b) and 10(c), it would be eminently appropriate for this Court to grant and hold the Petition until *Tahoe-Sierra* is decided, vacate the judgment below, and remand the case for further consideration in light of *Tahoe-Sierra*.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: December, 2001.

Respectfully submitted,

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Attorneys for Amicus Curiae